

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Rosario Marinello,

NO. C 08-00664 JW

Plaintiff,

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS; DENYING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

v.

California Dep't of Corrections &
Rehabilitation,

Defendant.

Rosario Marinello ("Plaintiff"), in *pro per*, brings this action against the California Department of Corrections & Rehabilitation ("Defendant"), alleging a single cause of action for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* Plaintiff alleges that Defendant removed him from a promotion list in retaliation for filing an Equal Employment Opportunity Commission ("EEOC") complaint.

Presently before the Court are Defendant's Motion to Dismiss and Plaintiff's Motion for Summary Judgment.¹ The Court found it appropriate to take the matter under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court DENIES Defendant's Motion to Dismiss and DENIES Plaintiff's Motion for Summary Judgment.

¹ (Memorandum of Points and Authorities in Support of Defendant California Department of Corrections and Rehabilitation's Motion to Dismiss the Amended Complaint, hereafter, "Motion to Dismiss," Docket Item No. 43; Plaintiff's Motion for Summary Judgment, hereafter, "Summary Judgment Motion," Docket Item No. 46.)

Defendant moves to dismiss Plaintiff's Amended Complaint on the grounds that (1) Plaintiff fails to allege that he engaged in any protected activity and (2) Plaintiff fails to allege any causal link between protected activity and an adverse employment action. (Motion to Dismiss at 3.)

In his Amended Complaint, Plaintiff alleges as follows:

On February 23, 2007, Plaintiff initiated an EEOC complaint after he was not hired for the position of Correction Counselor I ("CCI") at the Correctional Training Facility in Soledad, California ("CTF"). (Amended Employment Discrimination Complaint ¶ 6, hereafter, "Amended Complaint," Docket Item No. 41.) Plaintiff alleges that he was not hired as a CCI because of an internal investigation concerning him that was based on false allegations. (*Id.*) On May 10, 2008, Plaintiff received a letter from the CTF Soledad stating that he was no longer eligible for the CCI position through the "Open Promotion List." (*Id.*)

Based on these allegations, Plaintiff alleges that Defendant's conduct was "discriminatory with respect to . . . [r]etaliation for engaging in [p]rotected [a]ctivities." (*Id.* ¶ 5.)

Under Title VII, a plaintiff may establish a *prima facie* case of retaliation by showing that (1) he engaged in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a causal link between the protected activity and the employer's action. Passantino v. Johnson & Johnson Cons. Prods. Inc., 212 F.3d 493, 506 (9th Cir. 2000).

"The term 'protected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000) (citing 42 U.S.C. § 2000e-3). An adverse employment action is one that is "reasonably likely to deter employees from engaging in protected activity." See Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000). Filing an EEOC complaint is a "quintessential" activity protected by Title VII. McGinest v. GTE Service. Corp., 360 F.3d 1103, 1125 n.19 (9th Cir. 2004). A causal link between protected activity and an adverse employment decision may be "inferred from proximity in time between the protected action and the allegedly retaliatory employment decision." Ray, 217 F.3d at 1244 (quoting Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)).

Here, as alleged, Plaintiff engaged in a protected activity by filing a complaint with the EEOC that was intended to protest or oppose what Plaintiff believed to be prohibited discrimination. Plaintiff also alleges that he suffered an adverse employment decision by losing his eligibility to be

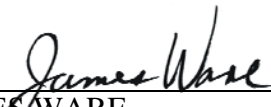
1 on the Open Promotion List. With respect to Defendant's contention that Plaintiff has failed to
2 establish a causal link between any protected activity and an adverse employment decision, Plaintiff
3 alleges that he received a letter from Defendant stating that he was no longer eligible for the Open
4 Promotion List three months after filing his February 2007 EEOC complaint. The Court finds that,
5 under the notice pleading standards, a causal link may be inferred based on the proximity in time
6 between losing eligibility to be on the Open Promotion List and Plaintiff's filing of an EEOC
7 complaint.

8 Accordingly, the Court DENIES Defendant's Motion to Dismiss. The Court also DENIES
9 Plaintiff's Motion for Summary Judgment as premature.

10 The parties are ordered to appear for a Case Management Conference on **November 24,**
11 **2008 at 10 a.m.** On or before **November 14, 2008**, the parties shall file a Joint Case Management
12 Statement. The Statement shall include, among other things, a good faith discovery plan with a
13 proposed date for the close of all discovery.

14 In light of this Order, the hearing on the Motions set for October 27, 2008 is VACATED.

15
16 Dated: October 21, 2008



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 David Pai David.Pai@doj.ca.gov
3 Karen K. Huster karenkiyo.huster@doj.ca.gov

4 Rosario Marinello
5 266 Reservation Rd. #f-232
6 Marina, CA 93933

7 **Dated: October 21, 2008**

Richard W. Wieking, Clerk

8
9 **By: /s/ JW Chambers**
10 **Elizabeth Garcia**
11 **Courtroom Deputy**